No. 89-786

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GARREY CARRUTHERS, GOVERNOR OF NEW MEXICO, O.L. MCCOTTER, SECRETARY OF CORRECTIONS, and ROBERT J. TANSY, WARDEN OF THE PENITENTIARY OF NEW MEXICO,
Petitioners,

v.

DWIGHT DURAN, LONNIE DURAN, SHARON TOWERS, AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

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In the petition for a writ of certiorari, petitioners showed that the court of appeals misinterpreted *Local No. 93 v. City of Cleveland*, 478 U.S. 501 (1986), and upheld continued enforcement against state officials of consent decree provisions unsupported by federal law. That ruling is contrary to decisions of other circuits and incorrect on three related grounds: the Eleventh Amendment; constitutional principles of federalism, comity, and separation of powers; and cases requiring that consent decrees be conformed to present federal law. Nothing in respondents' brief in opposition reinforces the court of appeals' decision or weakens the case for this Court's review.

1. Respondents first argue that the Court may not consider "the issue of equitable modification." Br. in Opp. 16-19.[1] The court of appeals, however, in fact ruled

[1] By that, respondents evidently mean the issue whether enforcing decree provisions unsupported by federal law violates *non-*

on the issue, by deciding that on this record, and without further factual development, enforcement of the challenged provisions does not violate the pertinent non-constitutional legal principles that constrain district courts' discretion to enforce consent decrees. The court decided the issue in two ways. First, it ruled that *Local No. 93*, a concededly non-Eleventh Amendment, non-constitutional decision, rendered valid the district court's refusal to vacate the challenged decree provisions. Second, the court ruled, even if only cursorily (Pet. App. 12a-13a), that still-valid federal law supports the challenged provisions, thus effectively disposing of the change-of-law argument.[2] Indeed, with respect to the court's reliance on *Local No. 93*, respondents themselves—by defending the ruling on its merits in the portion of their brief (at 14, 24-25) preceding the Eleventh Amendment discussion (at 26-38)—implicitly acknowledge that the court of appeals actually decided the non-constitutional "issue of equitable modification."

It is precisely the court of appeals' ruling that the district court was not legally obliged to modify the decree

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constitutional legal principles, such as the change-of-law doctrine of *System Federation No. 91, Ry. Employes' Dep't v. Wright*, 364 U.S. 642 (1961). Respondents' brief quite incorrectly treats the question of non-Eleventh Amendment limits on federal courts' equitable authority as entirely non-constitutional. Numerous decisions of this Court establish that constitutional principles of federalism, comity, and separation of powers do and must inform the limits of federal courts' equitable authority. *See* Pet. 15-16 & n.19; *see also* Br. Amici Curiae of State of Hawaii et al. 10 n.9. Those constitutional principles themselves (together with the Eleventh Amendment) require the vacating of consent decree provisions like those at issue here—or, at a minimum, give shape to the pertinent equitable modification principles. *See* Pet. 15-16, 18-20; Amicus Br. 12-18. Respondents simply ignore those considerations; their brief therefore is an utterly incomplete response to the petition.

[2] In these circumstances, it borders on the frivolous to suggest, as respondents seem to (Br. in Opp. 38 n.9, 39), that petitioners should file a new equitable modification motion based on change of law. The issue effectively has been decided.

on the present record that the petition challenges. That issue is squarely presented because it was squarely decided below. Contrary to respondents' suggestion (Br. in Opp. 13, 38-39), it is simply irrelevant that a *different* argument for equitable modification, based on a new factual record perhaps showing "changed circumstances," was not addressed below, for no such argument is made here.[3] Of course, respondents do not and cannot cite any authority suggesting that this Court may not properly review what the court of appeals in fact decided.

Not only was the issue decided below, which is itself sufficient for this Court's review, but petitioners argued for "equitable modification," based partly on changes of law, to both of the lower courts. In the court of appeals, petitioners devoted an entire section of their brief to the argument that principles of comity required vacating the challenged provisions in light of post-decree changes of law. *See* Br. for Appellants 36-43 (relying on, *e.g.*, *System Federation* and *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976)). In the district court, petitioners repeatedly stated in their briefs supporting the present decree-modification motion that it was based on all of the grounds that are presented in the petition—the Eleventh Amendment; constitutionally based principles of federalism, comity, and separation of powers; and the change-of-law doctrine requiring modification of consent decrees to conform to present law.[4] Although respondents sug-

[3] The court of appeals expressly noted in its final footnote that such an argument remained open and was not before it. Pet. App. 15a n.12. Respondents, while suggesting that petitioners be remitted to a factual hearing before the district court, never outline what facts they think would be relevant to the change-of-law issue.

[4] *See* Mem. of Pts. & Authorities in Support of Defs. Motion to Vacate Portions of the 1980 Decree ("Br. for Defs.") at 1 (relying on the Eleventh Amendment "and principles of comity"); *id.* at 3-10 (explaining that the decree is invalid to the extent it goes beyond protection of federal rights, quoting federalism and separation of powers principles from, *e.g.*, *Bell v. Wolfish*, 441 U.S. 520 (1979); *Procunier v. Martinez*, 416 U.S. 396 (1974); *Turner v. Safley*, 107 S. Ct. 2254 (1987); *Rizzo v. Goode*, 423 U.S. 362

gest the contrary by quoting the first footnote in petitioners' district court brief (Br. in Opp. 8, quoting Br. for Defs. 1-2 n.1), that footnote merely explained at the outset of the brief that the present motion did not require any factual inquiry, and in that respect was quite unlike the previously filed but still-pending modification motion, as to which the district court had ruled that a factual inquiry was required. *See* Doc. No. 908, Order at 2-3 (filed Oct. 3, 1986).[5] Even by its terms, but especially read in

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(1976); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981)); *id.* at 9-10 (arguing that "federal courts must stand ready to alter any existing decree whenever it becomes clear that any portion of that decree violates th[e] general principle" that a decree may not "go beyond what is necessary to protect constitutional rights," citing, *e.g.*, *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976); *Nelson v. Collins*, 659 F.2d 420 (4th Cir. 1981)); *id.* at 10 (explaining that, although "established comity principles are sufficient, on their own, to require" vacating the challenged provisions, "[t]he Eleventh Amendment merely provides a concrete guarantee of these federalism principles"); *id.* at 12-13 n.8 ("even in the absence of the Eleventh Amendment, a court would be required, under the many decisions already discussed, to be receptive to any motion by state defendants seeking to bring a consent decree into conformance with current legal requirements, especially where those requirements have changed since entry of the decree," citing *Spangler* and *Nelson v. Collins*); *id.* at 21 n.16 ("comity principles requir[e] elimination of provisions that exceed federal law," citing *Nelson v. Collins* and *System Federation*); *id.* at 65 (conclusion: enforcement of the challenged provisions "is beyond the Court's power under general principles of comity and under the Eleventh Amendment"). *See also* Defs. Reply Mem. 12 n.13 (citing Fed. R. Civ. P. 60(b)(5), (6), explaining that *System Federation* requires change-of-law modification even in a private-party case, and stating that "when the sovereign interests of a state are implicated by a consent decree, the court has a clear duty to exercise its modification authority to reflect subsequent decisions cutting back on enforceable rights").

Ten copies of petitioners' briefs in the district court and in the court of appeals have been lodged with the Clerk of this Court.

[5] Respondents misleadingly state that petitioners "withdrew their previous motion to modify judgment" on April 24, 1987. Br. in Opp. 7. Petitioners withdrew only one motion (filed Feb. 6, 1987), a single-page request specifically addressed to double celling,

the context of the rest of petitioners' argument, the quoted passage does not restrict to the Eleventh Amendment the legal grounds being asserted in support of the core argument that the challenged decree provisions "are unenforceable as a matter of law because they purport to create entitlements that, on their face, cannot be construed as legitimate measures for vindicating federal rights." Br. of Defs. 1 n.1.

2. Turning to the merits, respondents begin by attempting to distinguish *System Federation*, arguing that it does not support modification of the decree in this case. Br. in Opp. 19-21. This case, however, involves no less an inconsistency with governing law than was present in *System Federation*. There, this Court required the district court to vacate a consent decree in which a union and employer agreed not to form a union shop, explaining that the post-decree 1951 amendment to the Railway Labor Act, 45 U.S.C. § 152, permitted certain union shops. Contrary to respondents' suggestion, *System Federation* did not involve any direct inconsistency between the 1951 amendment and the decree: the amendment merely permitted but did not require a union shop. *See* 45 U.S.C. § 152 Eleventh ("permitted"); *Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 231 (1956) ("[t]he union shop provision of the Railway Labor Act is only permissive"). To the extent there was any inconsistency, it was only that the decree impaired the general "objective[]" of the 1951 amendment to leave certain employers and unions free to form union shops if they wished. *See* 364 U.S. at 651; *Local No. 93*, 478 U.S. at 527. In the present case, post-1980 legal developments similarly make clear that what the decree forbids the

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an issue then incorporated in the present motion. Petitioners never withdrew their much larger equitable modification motion (filed Dec. 2, 1985) covering numerous provisions of the decree. It was with respect to that motion that the district court had ruled in October 1986 that factual inquiry was required, and that is the motion addressed in the footnote quoted by respondents.

Constitution permits; and because the Constitution, for important structural and practical reasons, commits to state discretion matters not governed by federal law, a decree provision that requires state prison officials to do what federal law does not require is every bit as inconsistent with constitutional "objectives" (*see, e.g., Turner v. Safley*, 107 S. Ct. 2254, 2259 (1987)) as the *System Federation* decree provision was inconsistent with statutory objectives.[6]

Respondents next defend the court of appeals' reliance on *Local No. 93*, stating that this Court there held that "when a consent decree is within the trial court's subject matter jurisdiction, is within the general scope of the pleadings, and furthers the general objectives of the law, the consent decree is valid." Br. in Opp. 14; *see id.* at 24-26. That is not what *Local No. 93* held. Respondents' and the court of appeals' view misreads *Local No. 93*, transforming a set of necessary conditions for validity into a set of sufficient conditions, and extending the narrow statutory holding to a general principle validating consent decrees in all contexts. That view also blindly

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[6] Contrary to respondents' claim (Br. in Opp. 22-24), moreover, both *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), and *Rhodes v. Chapman*, 452 U.S. 337 (1981), marked significant changes in the law relied on by the decree. As for *Pennhurst*, the inclusion of state-law claims in the complaint (as well as the reliance on state law in the decree) itself attests to the pre-*Pennhurst* assumption that the federal court could enforce state-law duties against state officials. *See Lelsz v. Kavanagh*, 807 F.2d 1243, 1253 (5th Cir.), *reh'g denied*, 815 F.2d 1034, *cert. dismissed*, 483 U.S. 1057 (1987) (noting pre-*Pennhurst* assumption). Similarly, *Rhodes* has been recognized as "a ground-breaking decision." *Inmates of Occoquan v. Barry*, 844 F.2d 828, 835 (D.C. Cir.), *reh'g denied*, 850 F.2d 796 (1988). *See also Nelson v. Collins*, 659 F.2d 420, 429 (4th Cir. 1981) (directing modification of single-celling requirement in light of change of law effected by *Rhodes*). *See also Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (Tenth Circuit decision, subsequent to entry of consent decree in this case, reversing portions of prison decree similar to some of those at issue here).

ignores the critical differences in context between *Local No. 93* and this case: entry versus modification of a decree; consenting versus objecting defendants; non-state official defendants versus state prison official defendants. Although respondents acknowledge that the *Local No. 93* Court expressly distinguished the decree-modification question from the decree-entry question, they mistakenly claim that the Court distinguished only a case involving an effort to extend a consent decree. Br. in Opp. 25-26. In fact, the *Local No. 93* Court also carefully distinguished *System Federation*, which involved a refusal to vacate a decree. 478 U.S. at 526-27. In short, the court of appeals' refusal to vacate the decree in this case cannot be supported on the basis of *Local No. 93*.

With respect to the Eleventh Amendment issue, respondents argue that the decree provisions at issue here are proper remedies under federal law and hence can be enforced against state officials. Br. in Opp. 26-35. That argument fails to come to grips with the central flaw in the court of appeals' ruling—that the court made no serious attempt to show how each of the challenged provisions was properly tied to a federal constitutional right, given the numerous, detailed *un*challenged decree provisions that address every aspect of prison conditions that is of federal constitutional concern. Respondents themselves make no such attempt, merely making the bald assertion that all of the decree provisions are tied to the lack of personal safety. Br. in Opp. 28; *see id.* at 26-35. That approach recognizes no limits to institutional reform by consent decree and flouts all of the principles of judicial restraint limiting the occasions for interference with state officials' operation of state prisons. *See, e.g., Turner v. Safley, supra*; Pet. 15-16.[7]

[7] Respondents' reliance on *Hutto v. Finney*, 437 U.S. 678 (1978), betrays the same refusal to focus on the justification for each particular challenged provision, judged in light of the presence of all of the unchallenged decree provisions. Br. in Opp. 32-34. This Court in *Hutto* was careful to judge the 30-day limit on punitive confinement in light of the patently deficient conditions

Respondents also argue on policy grounds against requiring close scrutiny of challenged provisions of consent decrees against state officials, suggesting that such scrutiny would be difficult and that the prospect of such review would have an adverse impact on settlements and would effectively "requir[e] trials of all cases involving state defendants." Br. in Opp. 37. But such policy considerations, even if sound, could not justify overriding fundamental constitutionally based limits on federal court authority. In any event, respondents' concerns not only rest on sheer guesswork about the systemic effects of an insistence on a federal law basis for enforcement of decree provisions, but are highly dubious. It seems unlikely that plaintiffs would insist on a trial rather than enter a settlement simply because they could not enforce portions of a settlement that gave them more than they might be entitled to as a remedy after trial. Indeed, far from inhibiting settlements, a rule ensuring that state officials are not frozen into outmoded and legally unjustified consent decrees may well have the effect of encouraging settlements by state officials who otherwise would not settle. And, of course, as the practice of other courts of appeals illustrates (*see* Pet. 28-30), reviewing consent decrees to determine whether each provision has a sufficient basis in federal law would not present an impractical or unfamiliar task for courts. *See generally* McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. Chi. Legal F. 295.

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of the isolation cells themselves. 437 U.S. at 687-88 & n.9. Respondents do not offer any explanation of how the decree provisions at issue in the present case can be justified for prison cells that were not even in existence at the time of the decree or where constitutional conditions are independently guaranteed. As the Fifth Circuit explained in *Ruiz v. Estelle*, 679 F.2d 1115, 1140 n.98, 1153, *modified*, 688 F.2d 266 (1982), *cert. denied*, 460 U.S. 1042 (1983), the "totality of the circumstances" test of *Hutto* requires a careful analysis of the need for each particular decree provision to cure any constitutional violation. The Tenth Circuit refused to undertake any such analysis.

3. Respondents finally attempt to show that the lower courts have not actually taken different approaches to the questions presented in this case. Br. in Opp. 41-47. That attempt is unavailing. Most notably, the Fifth Circuit decision in *Lelsz v. Kavanagh*, *supra*, in ruling that the consent decree at issue could not be enforced, plainly rejected the three-part test the Tenth Circuit extracted from *Local No. 93* and found sufficient in this case. 807 F.2d at 1252. Contrary to respondents' suggestion (Br. in Opp. 42-43), the Fifth Circuit's subsequent decision in *Ibarra v. Texas Employment Comm'n*, 823 F.2d 873 (1987), does not alter *Lelsz*'s ruling or approach. *Ibarra* merely held that there was no Eleventh Amendment bar to enforcement of consent decree provisions that were clearly based on federal law (the defendants admitted as much, and the state statute at issue expressly incorporated federal standards). 823 F.2d at 877. *Ibarra* does not repudiate *Lelsz*'s approach requiring close scrutiny of the federal law basis for each particular decree provision at issue.[8] It is just that sort of careful analysis that the Tenth Circuit rejected here.[9]

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[8] In *Lelsz*, the Fifth Circuit did not simply state that the decree provisions at issue were based on state law. It reached that conclusion, after showing that the parties and the district court obviously thought that federal law might have supported the provisions, only upon careful analysis of whether the provisions were in fact proper remedies for violations of any federal rights. 807 F.2d at 1248 & n.6, 1247-51.

[9] Respondents claim that *Lelsz* "applied the first prong of the *Local Number 93* test by assessing whether or not the trial court had jurisdiction to enter the consent decree." Br. in Opp. 44-45. But *Lelsz* plainly rejected reliance on *Local No. 93* for judging the validity of enforcement of a decree. 807 F.2d at 1252. *See Kozlowski v. Coughlin*, 871 F.2d 241, 244 (2d Cir. 1989) (expressly rejecting *Lelsz* conclusion). In any event, respondents' effort to conform *Lelsz* to the Tenth Circuit's reading of *Local No. 93* merely dresses up the critical issue in different garb; it does not change the issue in dispute. The question remains whether enforcement of particular consent decree provisions requires that those provisions be based on federal law, or whether, as the Tenth Circuit held, jurisdiction over the complaint as a whole justifies enforce-

Respondents' efforts to distinguish other decisions fare no better. *Ruiz v. Estelle*, *supra*, did not reject all use of the "totality of the circumstances" approach (Br. in Opp. 46 & n.15), but it did reject the improper catchall use of that approach to justify any prison reform measure once a totality of conditions violation has been found; the court required instead the sort of searching review of the justification for each decree provision that the Tenth Circuit has deemed unnecessary. Similarly, respondents' only basis for distinguishing *Nelson v. Collins*, *supra*, is that the case involved equitable modification; but so too does this case. Likewise, although respondents point out that *Washington v. Penwell*, 700 F.2d 570 (9th Cir. 1983), involved a ruling that a consent decree running directly against the state treasury could not be enforced as a contract because state officials had no authority to enter the contract, the decision also involved a ruling that the decree could not be enforced in any event because it required of state officials more than the federal Constitution requires. *Id.* at 574. Like *Penwell*, this case involves a consent decree that must be modified because it goes far beyond federal law and its enforcement therefore exceeds federal court authority over States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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ment of any consent decree provision remotely related to the complaint.